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IN THE

SUPREME COURT OF THE UNITED STATES

NO. ~~1802~~ 70-258

BETH KOEHLER DIEHL, ET AL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' APPENDICE FOR THEIR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Samuel Williamson
Attorney for Petitioners
1320 Americana Building
Houston, Texas 77002

Donald G. Ritter, Pro se
Attorney at Law
502 Houston First Savings Building
Houston, Texas 77002

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

BETH KOEHLER DIEHL, Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, and Beth Koehler Diehl, Individually,	)	
Plaintiff	)	CIVIL NO. 4662
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant	)	

DOUGAL C. POPE, 502 Houston First Savings Building, Houston, Texas 77002, for the plaintiff

JOHN O. JONES, Tax Division, Department of Justice, 7A06 Federal Building, Fort Worth, Texas 76102, for the defendant

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MEMORANDUM OPINION

This is a civil action for the recovery of federal income taxes for the calendar year 1957.

This matter is now before the Court on a motion filed by the plaintiff, Beth Koehler Diehl,[1] for reconsideration[2] of a previous order entered by this Court on a motion to vacate and to stay proceedings which was heretofore filed by the Government. The motions, which are the subject of this memorandum opinion, have been fully briefed by counsel and oral hearing thereon was had in Beaumont, Texas on July 18, 1968. Before discussing the merits of the pending motions, it would be well to trace the

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1/ The plaintiff, Beth Koehler Diehl, also known as Elizabeth Jameson Diehl, will hereinafter sometimes be referred to as the "taxpayer." The defendant, United States of America, will be referred to as the "Government."

2/ At the same time that the taxpayer filed her motion for reconsideration, she also filed a motion to strike certain portions of an affidavit of counsel for the defendant which was attached to a prior motion filed by the defendant. The Court will also discuss and dispose of the motion to strike herein.

developments in this case which preceded the filing of these motions.

On September 27, 1962, Kent B. Diehl, Sr.,[3/] through his attorney, Dougal C. Pope, of Houston, Texas, filed the complaint herein, seeking recovery of federal income taxes totaling $5,548.21, allegedly paid by him, individually, for the calendar year 1957. The complaint involves a claim for refund filed by Diehl, Sr., individually, for the year 1957, wherein he claimed that the sum of $5,548.21 in income taxes was erroneously collected from him, individually, by the Government for the calendar year 1957. The Government's answer was timely filed on November 30, 1962.

On December 17, 1962, the parties filed a joint motion for an order to stay proceedings, requesting that the Court stay all

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[3/] Kent B. Diehl, Sr., will hereinafter sometimes be referred to as "Diehl, Sr."

proceedings in this action until disposition of criminal proceedings then pending against Diehl, Sr., for alleged criminal tax violations relative to certain issues which are the basis of Diehl, Sr.'s complaint in the instant case. An order staying all proceedings in this case was entered on December 17, 1962. A criminal proceeding styled United States v. Kent B. Diehl, Sr., Cr. No. 5510 (E.D. Texas - Beaumont Division), was filed by the Government against Diehl, Sr., alleging criminal tax violations. However, Kent B. Diehl, Sr., died on September 22, 1966, and subsequently an order was entered dismissing Criminal Case No. 5510. Thereafter, this action was restored to the calendar of active cases.

On December 8, 1966, the taxpayer (who at all times pertinent was a resident of Houston, Harris County, Texas, through her attorney, Dougal C. Pope, also of

Houston,[4/] filed herein a document entitled "Motion of Intervention," alleging that she and Diehl, Sr., deceased, filed a joint federal income tax return for the calendar year 1957 and paid the sum of $5,548.21 in tax with respect to the return, which amount represented community property of herself and Diehl, Sr. Taxpayer further alleged that she, individually, is entitled to a portion of any income tax refund that may be recovered in this action, and that she, individually, is an indispensable party to this action. On December 12, 1966, this Court entered an order granting the motion and permitting taxpayer, individually, to intervene as one of the plaintiffs in this case. Thereafter, taxpayer filed a document entitled "Pleadings of Beth Koehler Diehl,"

[4/] Mr. Pope has, at all times here pertinent, acted as the attorney for both Diehl, Sr., and the taxpayer.

wherein she adopted in toto all of the pleadings which were previously filed herein by Diehl, Sr., as if she had been a plaintiff when the original complaint was filed.

On February 13, 1967, taxpayer filed herein a document entitled "Motion That Beth Koehler Diehl, Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, be Substituted as One of the Plaintiffs in Place of Kent B. Diehl, Sr.," alleging that (1) Kent B. Diehl, Sr., died on September 22, 1966, and (2) she was appointed Independent Executrix of the Estate of Kent B. Diehl, Sr., on January 24, 1967. In the motion to substitute, it was requested that Beth Koehler Diehl, Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, be substituted as one of the plaintiffs in this case in place of Diehl, Sr. The motion for substitution was not opposed by the Government and, by order entered on February 20,

1967, the taxpayer's motion was granted and she was substituted in her fiduciary capacity as one of the plaintiffs herein in place of Diehl, Sr.

On August 2, 1967, the Government filed its first amended answer, alleging a counterclaim against the taxpayer and Diehl, Sr. The counterclaim alleges that on July 21, 1967, the Government made an assessment against Kent B. Diehl, Sr., and Beth Koehler Diehl for federal income taxes, civil fraud penalties, and interest in the amounts of $499,337.95, $249,688.97, and $277,625.06, respectively, for the calendar year 1957.

This, then, was the status of the case when, on May 20, 1968, the Government filed its motion to vacate and to stay proceedings. The taxpayer's motion for reconsideration (as well as her motion to strike portions of counsel's affidavit) is, of course, directly related to the Government's motion to vacate

and to stay proceedings and this Court's ruling thereon. The taxpayer filed an opposition to the motion to vacate and to stay proceedings, with an accompanying brief. The Court then granted the Government's motion to vacate and to stay proceedings in all respects. Thereafter, the taxpayer filed a motion for reconsideration, asking that the Court reconsider its ruling on the Government's motion, and vacate its order granting the Government's motion to vacate and to stay proceedings. The grounds relied upon by the taxpayer in support of her motion for reconsideration are exactly the same as those she relied upon in opposing the Government's motion. As the Court has already noted, the Government's motion has already been granted and, thus, no further ruling thereon is required. However, since the pending motions of the taxpayer are based upon the same grounds as she relied upon in opposing

the Government's motion to vacate and to stay proceedings, the Court will enunciate the basis of its decision on the Government's motion, not in order to reaffirm its position thereon, but in order to dispose of taxpayer's pending motions.

The Government filed its motion requesting therein that the Court vacate its order of February 13, 1967, wherein Beth Koehler Diehl, Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, was substituted as one of the plaintiffs in the place of Diehl, Sr. The motion further requested that the Court stay all further proceedings in this case until a "proper and duly qualified legal representative" of Diehl, Sr., is appointed and, upon motion, substituted in place of Diehl, Sr. The Government's motion brought to the Court's attention a number of facts which were not within the Court's knowledge at the time that the

taxpayer's motion for substitution was entertained and granted. Those facts are as follows:

1. On January 24, 1967, the Harris County Court, sitting as a probate court, entered a decree in the matter styled Estate of Kent B. Diehl, Sr., Cause No. 94,261, wherein it was ordered (1) that the last will and testament executed by Diehl, Sr., on March 27, 1956, be admitted to probate; (2) that taxpayer's application for probate of the will and the will be recorded; (3) that taxpayer be independent executrix of the will and the Estate of Kent B. Diehl, Sr., to serve without bond, and (4) that Letters Testamentary are issued to taxpayer as Independent Executrix of the will and the Estate of Kent B. Diehl, Sr. The decree entered by the Harris County Court was based upon evidence presented to it by taxpayer and her attorney that, among other things, Kent B.

Diehl, Sr., was, at the time of his death, married to taxpayer, was a resident of Harris County, Texas, and that the will was never revoked by him.

2. On October 27, 1959, the taxpayer commenced the action styled Elizabeth Jameson Diehl v. Kent Brown Diehl, Sr., Case No. 3939/959, in the First Civil Court, Judicial Branch of the State of Chihuahua, Bravos District, Ciudad Juarez, Republic of Mexico, wherein she sought a decree of absolute divorce and dissolution of the marriage bond then uniting the parties to the divorce action. Both parties were represented by counsel in the divorce action and, on October 28, 1959, the Mexican divorce court granted a final judgment decreeing that the marriage was dissolved, with no restriction on either party as to remarriage and restoring to taxpayer her maiden name, Elizabeth Jameson.

3. On November 26, 1959, shortly after the Mexican divorce proceedings, Diehl, Sr., and Carmen Ramsey were married by one E. L. DeVore, a Methodist minister at Joplin, Missouri. At or about that same time, Diehl, Sr., left Harris County, Texas, and moved his residence to Pittsburg, Cramford County, Kansas, whereat he did reside until the year 1961. Diehl, Sr., and his wife, Carmen Ramsey, left Pittsburg, Kansas, during the year 1961 and moved their permanent residence to Glendale, California, where they remained, residing as husband and wife, until his death at Glendale Memorial Hospital, Glendale, California, on September 22, 1966.

In its motion, the Government contended that the taxpayer and her attorney knowingly and willfully made a number of misrepresentations of material fact and, in some instances, made false representations of fact to the Harris County Court in applying for

probate of Diehl, Sr.'s will and for issuance of letters testamentary. It was claimed that these false and fraudulent misrepresentations of fact were relied upon by the Harris County Court and were the foundation of that court's order naming the taxpayer as Independent Executrix and issuing to her Letters Testamentary. The Government further contended that the taxpayer is not qualified by law to serve in such a fiduciary capacity as her appointment was obtained by false and fraudulent means and this Court should, therefore, vacate its order substituting the taxpayer, acting as Independent Executrix, for Diehl, Sr.

The taxpayer's opposing affidavit (filed in support of her opposition to the Government's motion) does not deny any of the statements contained in the affidavit of Government counsel concerning the marriage of Diehl, Sr., to Carmen Ramsey, his moving his residence

to Kansas, then to California, his death while a resident of California, or any of the facts concerning the pleadings filed by her in the Harris County Court.[5/] The opposing affidavit states that she and Diehl, Sr., went to Mexico for a period of five or six hours in October of 1959 for the express purpose of obtaining a divorce; that they did

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5/ Taxpayer did file a motion to strike certain portions of the affidavit of the Government's trial counsel which supports the motion to vacate and to stay proceedings. She maintained that certain portions of the affidavit should be stricken on the grounds that there was no showing that the statements of counsel were based upon his personal knowledge. However, the affidavit of Mr. Jones (the Government's trial counsel) clearly states that the "assertions of fact [contained in the motion to vacate and to stay proceedings and in the supporting affidavit] are based upon my study of the files furnished to me [the official administrative files of the Internal Revenue Service and the official files of the Department of Justice], my investigation of this case in conjunction with the preparation of the same for trial, and my instructions given to other Government personnel regarding certain actions to be taken in this case." The taxpayer's motion to strike is without merit.

not establish a domicile in Mexico and, therefore, the Mexican divorce is void and, thus, they were married when he died. Taxpayer maintains generally that she is the "proper party" for substitution in this action in place of Diehl, Sr., within the meaning of Rule 25(a)(1) of the Federal Rules of Civil Procedure; that this Court is required to give full faith and credit to all of the pertinent orders of the Harris County Court, regardless of the factual representations underlying the issuance of these orders; and, finally, that the Government is required to pursue its available remedies in the courts of the State of Texas before it may seek relief from this Court.

Rule 25(a)(1) of the Federal Rules of Civil Procedure, insofar as here pertinent, provides that "If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties."

In Mallonee v. Fahey, 200 F. 2d 918 (C.A. 9th, 1952), in referring to the phrase "proper parties," the court said (p. 919):

> It is plain, I think, that Rule 25(a)(1) applies only to the substitution of legal representatives. That is not only clear from its history; it is implicit in the wording of the provision and in the cases construing it. (Emphasis supplied.)

Though not usually stated, the rationale of the rule is that the legal title to all causes of action in favor of the decedent which survive his death passes immediately to the executor or administrator on the granting of letters testamentary or of administration. Thus, the "proper party" to be substituted under Rule 25(a)(1) is the legal representative of the decedent. The question then turns on whether, as the taxpayer claims, this Court must give full faith and credit to the Harris County Court's order appointing her as Independent Executrix.

It is well settled that a valid state court judgment is entitled to res judicata

effect in the courts of the rendering states (Hansberry v. Lee, 311 U.S. 32 (1940)), and to full faith and credit in the courts of another state (Milliken v. Meyer, 311 U.S. 457 (1940)), and in the federal courts. Treines v. Sunshine Mining Co., 308 U.S. 66 (1939); Davis v. Davis, 305 U.S. 32 (1938). A void judgment or an interim order which is void creates a very different situation. A void judgment or a void interim order creates no binding legal obligation upon the parties or their privies and it is legally ineffective. Williams v. North Carolina, 325 U.S. 226 (1945); Kalb v. Feuerstein, 308 U.S. 433 (1940); Bass v. Hoagland, 172 F. 2d 205 (C.A. 5th, 1949), certiorari denied, 338 U.S. 816 (1949). Thus, a void judgment or a void interim order may be collaterally attacked at any time, in any proceedings, state or federal, in which the effect of the judgment or order comes into issue. Williams

v. North Carolina, supra; Kalb v. Feuerstein, supra; McDonald v. Mabee, 243 U.S. 90 (1917). Accordingly, the courts of the United States and of the several states need not give full faith and credit to the order of probate entered in Texas where it is determined that the probate court had no jurisdiction to enter the order.

The taxpayer's own testimony upon deposition reveals that she knew that Diehl, Sr., was a resident of the State of California at the date of his death and that she came within possession of this knowledge at the time she learned of his death. On December 13, 1966, the taxpayer filed a document in the Harris County Court requesting that she be appointed Administratrix of the Estate of Diehl, Sr., alleging therein that he died on September 22, 1966. She quite obviously became aware of the death of Diehl, Sr., sometime between September 22, 1966, and

December 13, 1966, and, as she testified, she also became aware of the fact that he died while a resident of the State of California. Yet, on December 13, 1966, and again on January 9, 1967, the taxpayer represented to the Harris County Court that "the domicile of the deceased [Diehl, Sr.] was Harris County, Texas." The Court finds that these representations as to the "domicile" of Diehl, Sr., which were made by the taxpayer were quite obviously false and were undoubtedly calculated to encompass a representation that the deceased died a "resident" of Harris County. This latter was a deliberate misrepresentation of fact that would have, if stated, been an obvious jurisdictional defect in the pleadings. The venue of probate proceedings as fixed by Section 6 of the Texas Probate Code is jurisdictional (White v. Baker, 118 S.W. 2d 319 (Tex. Civ. App.,

1938)) and the county court of the county of the decedent's residence at his death is the county having jurisdiction to probate his will. White v. Holmes, 129 S.W. 874 (Tex. Civ. App., 1910). Thus, had the truth been made known to the Harris County Court, that court would have been aware of the fact that it had no jurisdiction, under Section 6(a) of the Texas Probate Code, to admit the will to probate and issue letters testamentary, and the taxpayer's application (if based upon Section 6(a)) would have been denied.

Section 6(c) of the Texas Probate Code provides that if the deceased person has no domicile or fixed place of residence in the State of Texas and lived outside the State of Texas, then venue (and thereby, jurisdiction) for probate of his will and the administration of his estate lies in the county wherein his nearest kin resides.

Taxpayer maintains (presumably in the alternative) that since the Mexican divorce was invalid, she was the wife of Diehl, Sr., when he died and, therefore, Section 6(c) gives the Harris County Court jurisdiction since she resides in Harris County and is Diehl, Sr.'s nearest of kin. As noted supra, the taxpayer filed suit against Diehl, Sr., in a Mexican court seeking an absolute divorce and dissolution of their marriage. Both parties were represented by counsel in the proceeding and a divorce was granted on October 28, 1959. Needless to say, after being married to a person for approximately 13 years, divorce is an event that one is not likely to forget. However, on December 13, 1966, taxpayer represented to the Harris County Court that she was then the "wife of the decedent." Then, on January 9, 1967, she represented to the Harris County Court that she was

the "widow" of Diehl, Sr., and "That the deceased was never divorced." On November 13, 1966, when taxpayer filed the document with the Harris County Court requesting that she be appointed Administratrix of the Estate of Diehl, Sr., she stated that "based upon my understanding of the law," she was the wife of the deceased.

This Court finds it unnecessary to pass on the validity of the Mexican divorce, for it is clear that the taxpayer is estopped, in this or in any other court, at this point from challenging the validity of the Mexican divorce. Campbell v. Campbell, 362 S.W. 2d 904 (Tex. Civ. App., 1962); Dunn v. Tiernan, 284 S.W. 2d 754 (Tex. Civ. App., 1955), writ ref., n.r.e. Section 81(a)(9), Texas Probate Code, provides that the application for probate of a written will and issuance of letters testamentary shall state whether the decedent was ever

divorced, and, if so, when and from whom. Section 69, Texas Probate Code, states that if a testator is divorced after making a will, all provisions of the will in favor of the testator's spouse so divorced, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate shall be null and void and of no effect. Thus, the reasons for the statements to the probate court which were made by the taxpayer are quite obvious. The divorce rendered all the provisions of the will executed March 27, 1956, null and void insofar as they affected the taxpayer. Had this divorce proceeding been brought to the attention of the Harris County Court, it would have obviously denied the taxpayer's application for probate and issuance of letters testamentary, for want of jurisdiction. The Court here finds that, since the taxpayer is estopped from denying

the validity of the Mexican divorce, there is no merit in her argument that Section 6(c) of the Texas Probate Code provides the requisite jurisdiction.

In considering the taxpayer's arguments that either subsection (d) or (e) of Section 6 of the Texas Probate Code would provide the requisite jurisdiction, the Court notes that, in the absence of Diehl, Sr.'s domicile within the State of Texas, jurisdiction to probate his will is dependent upon the existence of assets in the State of Texas. Unless he possessed the assets within the state at the time of his death, the courts of the State of Texas are without jurisdiction to issue letters testamentary. Thormann v. Frame, 176 U.S. 350 (1900); see also 18 L.R.A. 243, annotations thereunder. If the Harris County Court had jurisdiction to probate Diehl, Sr.'s will, therey appointing the legal representative of his estate,

it can only be so by virtue of the existence of assets belonging to him in the State of Texas at the time of his death. It is to this issue that we must now turn.

The only asset belonging to Diehl, Sr., which could have conceivably had its situs in the State of Texas at the time of his death, was the suit instituted by him in 1958 in Texas for refund of income taxes from the United States. Any attempt to determine the situs of a cause of action belonging to or debt due the decedent, for the purpose of founding administration thereon, is, at best, engaging in the formation of what are often irrational legal fictions. The general rule is that, in the case of a private debtor, the debt is an asset at the domicile of the debtor, regardless of the existence or location of a promissory note, which has been given for it. See Maxwell v. Bugbee, 250 U.S.

525 (1919). However, this rule, as to private debtors, is not applicable to alleged debts due the decedent from the United States, in which category Diehl, Sr.'s refund claim falls. Though the decisions have been few and far between, it is at least clear that the situs of a debt due from the United States to a decedent, or otherwise, is not an asset at Washington, D. C., or any other place solely because the United States chooses to satisfy the debt at that place rather than another. Two early decisions of the Supreme Court, Vaughan v. Northup, 15 Pet. 1 (1841), and Wyman v. Halstead, 109 U.S. 654 (1884), make it quite clear that such a debt is an asset, for the purpose of founding administration, at the domicile of the creditor regardless of where the Government may choose to pay it or be sued. In Mellon v. Jones, 51 F. 2d 431 (C.A. D.C., 1931), the court reiterated that the debts due

from the United States have no locality in Washington, D. C., by virtue of the fact that that is where they are collectible. The court impliedly reasoned that, since the debt was not located in Washington, D. C., even though payable there, the District of Columbia could not have in rem jurisdiction over the assets (the debt) by virtue of which jurisdiction could be obtained over a Kentucky resident by publication, so as to conclude his interest in the debt.

The fact that Diehl, Sr., filed a claim for refund and subsequently filed suit for refund in the proper district court of Texas (under 28 U.S.C., Sec. 1402(a), the general venue statute for claims against the United States), does not affect the location of the cause of action and certainly does not hold it to be situated in the State of Texas, for the purpose of founding administration

thereon (28 U.S.C., Sec. 1346(a) provides that all district courts in the United States shall have jurisdiction of tax refund suits against the United States), just as in the Vaughan and Wyman cases, supra, the fact that the debts were collectible only in Washington did not establish their situs there. The United States is domiciled in every state in the Union, and, as such, the debt must be considered to have a situs in California, Kent B. Diehl's domicile at the time of his death.

The taxpayer also claims that the Court did not have "authority" to enter its order granting the Government's motion to vacate and to stay proceedings because the Government had not exhausted its available remedies in the State of Texas. However, the Harris County Court was without jurisdiction to appoint taxpayer to serve as Independent

Executrix and its order of appointment is void. Thus, the order of appointment is legally ineffective, is subject to collateral attack in this Court and neither this Court nor any other court is required to give full faith and credit thereto.

The taxpayer and her counsel, Mr. Pope, in effect, perpetrated a fraud on the Harris County Court and upon this Court. Where a fraud has been practiced upon a federal district court, that court has the inherent power to set aside a judgment or order obtained by such means. Universal Oil Co. v. Root Refg. Co., 328 U.S. 575, 580 (1946); Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944). So long as this Court has jurisdiction over this action, it has complete power over its orders made herein and it is empowered to revise or amend them when it is consonant with equity to do so. See, e.g., Fiske v. Buder, 125 F. 2d 841 (C.A.

8th, 1942).

The taxpayer's motion for reconsideration and all of the other pending motions filed by her shall be overruled and denied, and Beth Koehler Diehl, Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, shall be stricken from the caption of this case and Kent B. Diehl substituted in place thereof.

Dated the 25th day of November, 1968.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KENT B. DIEHL, SR. X

VS. X CIVIL NO. 4662

UNITED STATES OF AMERICA X

HONORABLE DOUGAL C. POPE
502 Houston First Savings Bldg.
Houston, Texas 77002

For the Plaintiff

HONORABLE BROOKS HARDEE
United States Attorney
United States Courthouse
Tyler, Texas 75701

For the Defendant

MEMORANDUM OPINION

This civil action for the recovery of federal income taxes for the calendar year 1957 was originally filed on September 27, 1962, by Kent B. Diehl, Sr. On motion of the parties, all proceedings were stayed for four years pending disposition of certain related criminal proceedings. On December 12, 1966, Beth Koehler Diehl was

allowed to intervene as a plaintiff in this cause. On February 20, 1967, the Court entered an order allowing Beth Koehler Diehl, in her capacity as independent executrix of the estate of Kent B. Diehl, Sr., to be substituted as a party plaintiff in place of the same Kent B. Diehl, Sr., who died September 22, 1966. Subsequently the Government filed a suggestion of death upon the record with respect to Kent B. Diehl, Sr., and a counterclaim was filed against the plaintiffs for federal income taxes, civil fraud penalties, and interest.

On May 29, 1968, on motion of the Government, the Court vacated the order of February 20, 1967 and stayed all further proceedings in this matter until a proper and duly qualified legal representative of the estate of Kent B. Diehl, Sr. could be appointed. Upon Mrs. Diehl's motion to reconsider this order, the matter was briefed and argued

to the Court by counsel, and the latter motion to reconsider was denied in a memorandum opinion and order entered November 29, 1968. That memorandum opinion set out the long history of this case and elaborated upon the basis of the Court's action in refusing to allow Mrs. Diehl to be substituted as a party plaintiff in her fiduciary capacity.

On April 8, 1969, this Court granted a motion to substitute Donald G. Ritter, temporary administrator of the estate of Kent B. Diehl, Sr., as a party plaintiff in place of Kent B. Diehl, Sr., deceased. The application of Donald G. Ritter for appointment as temporary administrator by the Probate Court of Harris County, Texas is attached as an exhibit to his motion to substitute filed in this Court. It was represented to the Probate Court that the only asset of the estate of Kent B. Diehl,

Sr., was a claim against the Internal Revenue Service for overpayment of income taxes for the year 1957 in the approximate amount of $3,000, which claim is the basis of the instant action pending in this Court. The administration was sought for the purpose only of receiving funds or money due to decedent on his estate from the United States and of representing the estate of Kent B. Diehl, Sr., in this action.

As the Court noted in its memorandum opinion of November 25, 1968, if the Harris County Court has jurisdiction to probate the will of Kent B. Diehl, Sr., and to appoint the legal representative of his estate, it can only be by virtue of the existence of assets belonging to the decedent in the State of Texas at the time of his death. It is admitted that the only asset of this estate is the suit instituted by Diehl in this Court in 1962 for refund of income

taxes from the United States. It was further pointed out in our earlier opinion that a debt due from the United States is an asset, for the purpose of founding administration, at the domicile of the creditor, regardless of where the government may choose to pay it or be sued. Kent B. Diehl, Sr., died a resident of the State of California. The fact that he filed the suit for refund in this Court pursuant to the general venue statute, 28 U.S.C.A. §1402(a), does not affect the locality of the chose and does not situate it in the State of Texas for the purpose of founding administration thereon. The debt must be considered to have its situs in California, Diehl's domicile at death.

It follows that the Harris County Court was without jurisdiction to appoint Donald G. Ritter as temporary administrator of the estate of Kent B. Diehl, Sr., and that such

appointment is void and not entitled to full faith and credit from this Court. Accordingly, the order of this Court of April 8, 1969, granting the motion to allow the substitution of Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, as a party plaintiff in place of Kent B. Diehl, Sr., will be vacated and an order will be entered denying the motion. The pleadings filed by the same Donald G. Ritter will be stricken, and Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, will be stricken from the caption of this case and Kent B. Diehl, Sr. substituted in place thereof.

Furthermore, inasmuch as this Court has already held that Beth Koehler Diehl is not a proper and duly qualified legal representative of the estate of Kent B. Diehl, Sr., and inasmuch as it appears to the Court

that Kent B. Diehl, Sr., has died leaving no assets in the State of Texas which would enable a probate court of this state to assume jurisdiction of the estate of Kent B. Diehl, Sr., or to appoint any administrator or legal representative for that estate for purposes of representing its interests in the instant lawsuit, the Court has concluded that this action, together with the Government's counterclaim, should be dismissed for want of jurisdiction in this Court. An Order will be entered accordingly.

Entered this 31st day of October, 1969.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KENT B. DIEHL, SR. X

VS X CIVIL NO. 4662

UNITED STATES OF AMERICA X

O R D E R

The Court having reconsidered upon its own motion its Order of April 8, 1969, granting the Motion of Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, to be substituted as a plaintiff in place of Kent B. Diehl, Sr., and in accordance with the Court's Memorandum Opinion entered contemporaneously herewith,

It is ORDERED that the said Order substituting Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, as a Plaintiff in the place of Kent B. Diehl, Sr., entered April 8, 1969, is hereby vacated;

It is further ORDERED that the said Motion of Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, to be substituted as a plaintiff in place of Kent B. Diehl, Sr., is hereby DENIED;

It is further ORDERED that the pleadings filed by the Plaintiff, Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, shall be stricken and Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., shall be stricken from the caption of this case and Kent B. Diehl, Sr. substituted in place thereof;

It is further ORDERED that the Plaintiff's complaint and the intervention, together with the defendant's counterclaim, be dismissed for want of jurisdiction in this Court.

ENTERED this 31st day of October, 1969.

/s/ Joe J. Fisher
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 29022

KENT B. DIEHL, SR., ET AL,
Plaintiffs,
BETH KOEHLER DIEHL, Individually, Etc., ET AL,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

(February 18, 1971)

Before COLEMAN, INGRAHAM, and WILKEY*,
Circuit Judges.

COLEMAN, Circuit Judge: This appeal presents three questions: (1) whether Mrs.

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*Judge of the United States Court of Appeals for the District of Columbia, sitting by designation.

Beth Koehler Diehl was estopped in the State of Texas from claiming to be the lawful widow of Kent B. Diehl, deceased; (2) whether her appointment as independent executrix of Diehl's estate by the County Court of Harris County, Texas, was void; and (3) whether either she as independent executrix, or a temporary administrator subsequently appointed, could be substituted as party plaintiff in a suit originally filed by the decedent for the refund of federal income taxes allegedly due the estate from a claimed overpayment in 1957, The District Court held against Mrs. Diehl and the temporary adminstrator on all points. They appeal. We affirm.

On September 27, 1962, Kent B. Diehl, Sr., formerly a resident of Orange, Texas, more recently a resident of California, filed suit in the United States District Court at Beaumont, Texas, for a refund of

$5,548.21 federal income taxes paid for the year 1957. The Government had already brought criminal proceedings against Diehl for alleged evasion of 1957 taxes. The District Court stayed all proceedings on the refund suit pending the disposition of the criminal charges. Mr. Diehl was suffering from a heart condition and secured several delays of a criminal trial on that account. On September 22, 1966, he died of a heart attack and the criminal prosecution was dismissed.

Some sixty days later, December 8, 1966, without mentioning Diehl's death, Beth Koehler Diehl moved to intervene as a plaintiff in the refund suit, alleging that she filed a joint return with the deceased in 1957, paid $5,548.21 in taxes which represented community property, and that she was entitled to 1/2 of any refund

which might be recovered. Leave to intervene was promptly granted.

On February 13, 1967, Mrs. Diehl moved to be substituted as one of the plaintiffs in the place of Kent B. Diehl, Sr., alleging that he had died on September 22, 1966, and that she had been appointed independent executrix of the estate on January 24, 1967. This motion was granted.

In August, 1967, the Government counterclaimed in the amounts of $499,337.95 federal income taxes, $249,688.97 civil fraud penalties, and $249,688.97 interest for the year 1957.

On May 20, 1968, the Government filed a sworn motion to vacate the order which had substituted Beth Diehl, independent executrix, as a party plaintiff. The motion was based on certain facts stated not to have been known to the Government, and unknown to the Court, when the substitution

order had been granted.

The Government's motion to vacate asserted that Mrs. Diehl's application for letters testamentary in the County Court of Harris County, Texas, was false and fraudulent, and was by her knowingly and wilfully made, in the following particulars:

1. The application alleged that Kent B. Diehl, Sr., was domiciled in Harris County, Texas, at the time of his death, whereas, in fact, Diehl moved to Pittsburg, Kansas, in 1959. He resided there until 1961, at which time he moved his permanent residence to Glendale, California, where he died at the Glendale Memorial Hospital on September 22, 1966;

2. The applicant asserted that she was the wife of Kent B. Diehl, Sr. at the time of his death and that she was his widow at the time of the filing of the proceedings

in Harris County, whereas, in fact, on October 28, 1959, at her suit, she obtained a divorce from Kent B. Diehl, Sr. in Juarez, Mexico, with both husband and wife being represented by counsel in the proceedings. Subsequently thereto, on November 26, 1959, at Joplin, Missouri, Diehl married Carmen Ramsey, with whom he was living as husband and wife in California at the date of his death;

3. That Mrs. Beth Koehler Diehl specifically represented in her Harris County application that Kent B. Diehl, Sr. was never divorced, making no mention of the Juarez divorce. Section 81(a)(9) of the Texas Probate Code requires a petition for probate to state whether a decedent was ever divorced.

Upon examination of the record, we find these sworn allegations to have been undisputed except that in her application

to the Harris County Court Mrs. Diehl as to the residency of the deceased added the words, "based on Applicant's understanding of the law". The statement that the deceased was never divorced was not qualified in any respect whatsoever.

It may be also pointed out that under §69 of the Texas Probate Code if a testator is divorced after making a will all provisions of that will affecting the previous spouse, including appointing her as a fiduciary, are rendered null and void. Mrs. Diehl's testimony by deposition revealed that she knew Kent B. Diehl, Sr., resided in California at the time of his death and, in fact, the undisputed allegations of the Government's motion to vacate shows that Mrs. Diehl's income tax returns for the calendar years 1959, 1960, 1961, 1962, 1963, 1964, 1965, and 1966 were all prepared by the attorney who represented her former

husband in his income tax troubles, who had filed the refund suit in 1962, and who represented her both in the County Court of Harris County and the United States District Court in these motions to intervene and for substitution as a party plaintiff. Mrs. Diehl attempted to claim that Diehl's visits to Houston to confer with his attorney about his income tax cases created a domicile in Harris County. The District Court correctly rejected this contention.

The District Court found that deliberate misrepresentations had been made to the County Court, intended to lead that Court to believe that the deceased resided in Harris County and that Beth K. Diehl was his widow, without which that Court would have held that it had no jurisdiction. These findings are amply supported in the evidence and are not clearly erroneous.

Mrs. Diehl defended her position in the District Court on the ground that the Mexican divorce was invalid, therefore she was the widow of the deceased. This is clearly untenable and a 1954 decision of the Texas Court of Civil Appeals put her and her counsel on definite notice to that effect. The situation here is in no wise dissimilar to that in Dunn v. Tiernan, 284 S.W. 2d 754 (Tex. Civ. Apps., 1955), in which it was settled in Texas that a party who seeks and obtains a Mexican divorce is thereafter estopped to deny its validity under the circumstances described in that opinion. To like effect, see Johnson v. Muelberger, 1951, 340 U.S. 581, 71 S. Ct. 474, 95 L. Ed. 552 (Florida divorce - full faith and credit); Perrin v. Perrin, 3 Cir., 1969, 408 F. 2d 107 (Mexican divorce - both parties appearing - comity).

In the light of these facts, the District

Court further held that the judgment of the Harris County Court naming Beth Koehler Diehl executrix of the estate of Kent B. Diehl, Sr. was void and not entitled to full faith and credit because it had been procured by fraud. The Court further held that in filing the application for substitution as a party plaintiff in the alleged capacity of executrix of the estate of the deceased Mrs. Diehl had likewise perpetrated a fraud upon the District Court. The order allowing Mrs. Diehl to intervene as a party plaintiff in her capacity as executrix was vacated.

This action was free of error. The deceased had no domicile in Texas, his domicile was in California, he had no fixed place of residence in Texas, he had no next of kin nor any property in Texas. The Probate Court of Harris County was led to believe that it had jurisdiction by the

misrepresentations already alluded to. Mrs. Diehl was estopped to contend that she was the widow of the deceased. Under the circumstances of this case the District Court was not required to give full faith and credit to the Harris County judgment admitting the will to probate and appointing Mrs. Diehl as executrix. Where jurisdiction depends upon domicile that question is always open to re-examination, even upon contradictory evidence, Burbank v. Ernest, 1914, 232 U.S. 162, 34 S. Ct. 299, 58 L. Ed. 551, expressly followed in Barney v. Huff, 326 S.W. 2d 617, 621 (Tex. Civ. Apps., 1959). Moreover, fraud destroys the validity of every thing into which it enters. It affects fatally even the most solemn judgments and decrees, Nudd v. Burrows, 1875, 91 S.W. 426, 440. Texas has repeatedly held that its Probate Courts are without jurisdiction to probate the wills of

deceased individuals domiciled in other states, with no fixed place of residence in Texas, and who die outside the State leaving no next of kin or property within the State. See, e.g., Cooper v. Gulf C. & S. F. Ry. Co., 93 S.W. 201 (Tex. Civ. Apps., 1906).

This leaves for disposition the issue as to the status of Mr. Ritter, the temporary administrator. On February 17, 1969, after Mrs. Diehl had been dismissed from the case, Donald G. Ritter, an attorney in Houston, Harris County, Texas, filed a motion in the United States District Court that he, as temporary administrator of the estate of Kent B. Diehl, Sr., deceased, be substituted as one of the plaintiffs for Kent B. Diehl, Sr. It was alleged that Ritter had been appointed temporary administrator of the estate on January 30, 1969, in the Harris County Court. This motion

to substitute was granted on April 8, 1969. On October 31, 1969, the District Court, sua sponte, reconsidered the order of April 8, 1969, vacated that order, denied the motion originally granted, struck the pleadings filed by Ritter, and dismissed the complaint, the intervention, and the counterclaim for want of jurisdiction.

In a memorandum opinion dated October 31, 1969, the District Court held that for the Harris County Court to have jurisdiction to appoint a legal representative of the estate of Kent B. Diehl, Sr., there had to be assets in the State of Texas belonging to the decedent at the time of his death; the only asset of the estate in the suit instituted by Diehl in the District Court in 1962 for the refund of income taxes from the United States; that for the purpose of founding an administration upon the estate of a decedent, a debt of the

United States is an asset at the domicile of the creditor, regardless of whether the Government may choose to pay it or to be sued for it; Diehl, Sr. was a resident of the State of California at his death; the fact that he filed the suit for refund in the District Court at Beaumont pursuant to the general venue statute 28 U.S.C.A., §1402(a) did not affect the locality of the chose; did not situate the claim in the State of Texas for the purpose of founding administration thereon; and that the debt [if there was one] must be considered to have its situs in California, the domicile of Diehl at his death. Therefore, held the District Court, the Harris County Court was without jurisdiction to appoint Ritter as temporary administrator of the estate because the application for the temporary administration revealed on its face that the claim for income tax refund

was the sole asset of the estate and the appointment pursuant to that allegation was void, Texas having no jurisdiction over the estate of a decedent domiciled in another state with no assets in the State of Texas.

Ordinarily, a debt is an asset at the domicile of the debtor, Maxwell v. Bugbee, 1919, 250 U.S. 525, 40 S. Ct. 2, 62 L. Ed. 1124. As to debts of the Government, however, the rule is otherwise. On at least two occasions the Supreme Court has held that as to debts of the Government the domicile for the purpose of founding administration is at the domicle of the creditor. As to this, see the very interesting decision in Wyman v. Halstead, 1884, 109 U.S. 654, 3 S. Ct. 417, 27 L. Ed. 1068, cited with approval in United States v. Borcherling, 1902, 185 U.S. 223, 22 S, Ct. 607, 46 L. Ed. 884.

Ritter claims, however, that §6(e) of the Texas Probate Code authorized his appointment. That section provides that letters of administration shall be granted in the county where the applicant resides "when the administration is for the purpose only (emphasis ours) of receiving funds or money due a deceased person or his estate from any governmental source or agency ...". The suit at Beaumont was against a governmental source. The temporary administrator, however, was not appointed "for the purpose only" of receiving money due but to pursue the lawsuit on behalf of a deceased non-resident in an effort to collect money alleged to be due. Moreover, the statute for the qualification of an administrator or an executor for the purpose stated does not declare that such an appointment may be made upon the estate of a non-resident independently of the

administrator or executor of the principal estate lawfully designated at the domicile of the deceased, where the claim is legally due and payable. The parties have cited no Texas decisions interpretating §6(e). In the absence of such an interpretation we are constrained to hold that the statute was not intended to allow strangers to the estate to administer, to the exclusion of the administrator at the domicile, on the estate of non-residents for the purpose of pursuing a lawsuit against any governmental source or agency in an effort to collect money alleged to be due.

In the instant case, the record shows, the Government counterclaimed for large sums of money. Pursuing the claim for $3,000 kept these huge claims alive; dismissing the litigation extinguished them, at least in the District Court. As to this situation see Wyman v. Halstead, supra.

Section 6(c)(d) of the Texas Probate Code provides that in the case of decedents who have no fixed place of residence in Texas, who die outside the state, and who have no nearest of kin in the state, letters of administration shall be granted in the county "where his principal estate was situated at the time of his death". Being of the view that any refund due the estate of Kent B. Diehl, Sr. was payable in California and his estate thus had no assets in the State of Texas, the above section of the Code would have no application.

We, therefore, affirm that part of the judgment of the District Court which held that neither Mrs. Beth Koehler Diehl nor Temporary Administrator Ritter had any right under Rule 25(a)(1) of the Federal Rules of Civil Procedure to be substituted as parties plaintiff in this litigation. As to them the suit was properly dismissed.

One point remains. Mrs. Diehl was allowed to intervene as a party plaintiff in her own right because she claimed that the income taxes of 1957 were paid from community property and that if there were to be a refund she was entitled to 1/2 of the recovery. Where a husband and wife, residing in a community property state, as here, file a joint tax return, the law assumes that half of the tax paid thereon represents the wife's interest in the community. In its brief the Government concedes that Mrs. Diehl might possibly be able to sue in her own right for refund of at least 1/2 of the tax paid, but the record does not show that she ever filed a claim, an essential statutory prerequisite for maintaining a suit for refund, §7422, Internal Revenue Code of 1954. Since there is no hint of the filing of such a claim, none may have been filed. In any event,

since the intervention was also dismissed the affirmance of the judgment of the District Court will be without prejudice to the right of Mrs. Beth Koehler Diehl, within thirty days of the receipt of the mandate in the District Court, to move for the reinstatement of the intervention in her personal behalf if such a claim was, in fact, filed. In the absence of such a motion, the District Court will again enter its order finally dismissing the personal intervention of Mrs. Beth Koehler Diehl.

The attorney for Mrs. Beth Koehler Diehl and Mr. Ritter gave notice of appeal from the judgment below, and thereby seeks to become a party on appeal. He was not a party below; he cannot be a party to this appeal. We decide nothing here with reference to said attorney or his participation in this litigation.

With the foregoing stipulation as to

possible intervention, the judgment of the District Court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29022

D. C. Docket No. CA 4662

KENT B. DIEHL, SR., ET AL
Plaintiffs,
BETH KOEHLER DIEHL, Individually, Etc., ET AL,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas

Before COLEMAN, INGRAHAM and WILKEY*, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here

ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

February 18, 1971

Issued as Mandate: March 24, 1971

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*Judge of the United States Court of Appels for the District of Columbia, sitting by designation.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

March 16, 1971

TO ALL PARTIES LISTED BELOW

RE: No. 29022 - Kent B. Diehl, Sr., et al vs. U. S. A.

Gentlemen:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: /s/ Frances Wolff
Deputy Clerk

cc: Mr. Dougal C. Pope
Mr. Donald G. Ritter
Hon. Johnnie M. Walters
Mr. Roby Hadden
Mr. Jerry Wells
Mr. Charles K. Ruth

APPENDIX C

STATUTES INVOLVED

Vernon's Texas Civil Statutes, Volume 17A, Probate Code.

SECTION 3. DEFINITIONS AND USE OF TERMS.

When used in this Code, unless otherwise apparent from the context:

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(o) "Heirs" denote those persons, including the surviving spouse, who are entitled under the statutes of descent and distribution to the estate of a decedent who dies intestate.

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(r) "Interested person" or "persons interested" means heirs, devisees, spouses, creditors, or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of a minor or incompetent ward.

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SECTION 6. VENUE FOR PROBATE OF WILLS AND ADMINISTRATION OF ESTATES OF DECEDENTS.

Wills shall be admitted to probate, and

letters testamentary or of administration shall be granted:

(a) In the county where the deceased resided, if he had a domicile or fixed place of residence in this State.

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(c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where his nearest of kin reside.

(d) But if he had no kindred in this State, then in the county where his principal estate was situated at the time of his death.

(e) In the county where the applicant resides, when administration is for the purpose only of receiving funds or money due to a deceased person or his estate from any governmental source or agency; provided, that unless the mother or father or spouse or adult child of the deceased is applicant, citation shall be served personally on the living parents and spouses and adult children, if any, of the deceased person, or upon those who are alive and whose addresses are known to the applicant. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 8. CONCURRENT VENUE AND TRANSFER OF PROCEEDINGS.

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(e) Jurisdiction to Determine Venue. Any court in which there has been filed an application for proceedings in probate shall have full jurisdiction to determine the venue of such proceeding, and of any proceeding relating thereto, and its determination shall not be subject to collateral attack. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 9. DEFECTS IN PLEADING.

No defect of form or substance in any pleading in probate shall be held by any court to invalidate such pleading, or any order based upon such pleading, unless the defect has been timely objected to and called to the attention of the court in which such proceedings were or are pending. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 10. PERSONS ENTITLED TO CONTEST PROCEEDINGS.

Any person interested in an estate may, at any time before any issue in any proceeding is decided upon by the court, file opposition thereto in writing and shall be entitled to process for witnesses and evidence, and to be heard upon such opposition, as in other suits. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 22. EVIDENCE.

In proceedings arising under the provisions of this Code, the rules relating to witnesses and evidence that govern in the District Court shall apply so far as practicable except that where there is no opposing party or attorney of record upon whom notice and copies of interrogatories may be served, service may be had by posting notice of intention to take depositions for a period of ten days as provided in this Code governing posting of notices. When such notice is filed with the clerk, a copy of the interrogatories shall also be filed, and at the expiration of ten days, commission may issue for taking the depositions, and the judge may file cross-interrogatories where no one appears, if he so desires. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 28. RIGHT OF APPEAL.

Any person who may consider himself aggrieved by any decision, order, decree or judgment of the court shall have the right to appeal therefrom to the district court of the county. Pending appeals from orders or judgments appointing administrators or guardians or temporary administrators or guardians, the appointees shall continue to act as such and shall continue the prosecution of any suits then pending in favor of the estate.—If on appeal from the county court, a different administrator or guardian is appointed, he shall be substituted in such suits. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 30. CERTIORARI.

Any person interested in proceedings in probate may have the proceedings of the county court therein revised and corrected at any time within two years after such proceedings were had, and not afterward. Persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to apply for such revision and correction. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 31. BILL OF REVIEW.

Any person interested may, by a bill of review, filed in the court in which the probate proceedings were had, have any decision, order, or judgment rendered by the court, or by the judge thereof, revised and corrected on showing error therein; but no process or action under such decision, order, or judgment shall be stayed except by writ of injunction, and no bill of review shall be filed after two years have elapsed from the date of such decision, order of judgment. Persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to apply for a bill of review. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 69. VOIDNESS ARISING FROM DIVORCE.

If the testator is divorced after making a will, all provisions in the

will in favor of the testator's spouse so divorced, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate or person of the testator's children, shall be null and void and of no effect. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 83. PROCEDURE PERTAINING TO A SECOND APPLICATION.

(a) Where Original Application Has Not been Heard. If, after an application for the probate of a will or for the appointment of a general personal representative has been filed, and before such application has been heard, an application for the probate of a will of the decedent, not theretofore presented for probate, is filed, the court shall hear both applications together and determine what instrument, if any, should be admitted to probate, or whether the decedent died intestate.

(b) Where First Will Has Been Admitted to Probate. If after a will has been admitted to probate, an application for the probate of a will of the decedent, not theretofore presented for probate, is filed, the court shall determine whether the former probate should be set aside, and whether such other will should be admitted to probate, or whether the decedent died intestate.

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SECTION 88. PROOF REQUIRED FOR PROBATE AND ISSUANCE OF LETTERS TESTAMENTARY OR OF ADMINISTRATION.

(a) General Proof. Whenever an applicant seeks to probate a will or to obtain issuance of letters testamentary or of administration, he must first prove to the satisfaction of the court:

(1) That the person is dead, and that four years have not elapsed since his decease and prior to the application; and

(2) That the court has jurisdiction and venue over the estate; and

(3) That citation has been served and returned in the manner and for the length of time required by this Code; and

(4) That the person for whom letters testamentary or of administration are sought is entitled thereto by law and is not disqualified.

(b) Additional Proof for Probate of Will. To obtain probate of a will, the applicant must also prove to the satisfaction of the court:

(1) If the will is not self-proved as provided by this Code, that the testator, at the time of executing the will, was at

least nineteen years of age, or was or had been lawfully married, or was a member of the armed forces of the United States or of the auxiliaries thereof, or of the Maritime Service of the United States, and was of sound mind; and

(2) If the will is not self-proved as provided by this Code, that the testator executed the will with the formalities and solemnities and under the circumstances required by law to make it a valid will; and

(3) That such will was not revoked by the testator.

(c) Additional Proof for Issuance of Letters Testamentary. If letters testamentary are to be granted, it must appear to the court that proof required for the probate of the will has been made, and, in addition, that the person to whom the letters are to be granted is named as executor in the will.

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SECTION 89. ACTION OF COURT ON PROBATED WILL.

Upon the completion of hearing of an application for the probate of a will, if the Court be satisfied that such will should be admitted to probate, an order to that effect shall be entered. Certified copies of such will and the probate

of the same, or of the record thereof, and the record of testimony, may be recorded in other counties, and may be used in evidence, as the original might be, on the trial of the same matter in any other court, when taken there by appeal or otherwise.

SECTION 93. PERIOD FOR CONTESTING PROBATE.

After a will has been admitted to probate, any interested person may institute suit in the proper court to contest the validity thereof, within two years after such will shall have been admitted to probate, and not afterward, except that any interested person may institute suit in the proper court to cancel a will for forgery or other fraud within two years after the discovery of such forgery or fraud, and not afterward. Provided, however, that persons non compos mentis and minors shall have two years after the removal of their respective disabilities within which to institute such contest. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 131. PROCEDURE.

(a) Necessity of Appointment. Whenever it appears to the county judge that the interest of a decedent's estate, or the interest of any minor, person of unsound mind, or common or habitual drunkard, and his or her estate, or either of them, requires immediate appointment of a personal

representative, he shall, by written order, appoint a suitable temporary representative, with such limited powers as the circumstances of the case require, and such appointment may be made permanent, as herein provided.

(b) Manner of Appointment. Such appointment may be made with or without application and without notice or citation. The order shall designate the appointee appropriately, as "temporary administrator" of the decedent's estate, or as "temporary guardian" of the person or of the estate, or both, of such minor, person of unsound mind, or common or habitual drunkard, fix the bond to be given and define the powers conferred on the appointee. When any such appointee has taken and filed his oath and filed with the county clerk a bond approved by the court, the clerk shall issue to the appointee letters which shall set forth the powers to be exercised by the appointee.

(c) Perpetuation of Appointment. The order making the appointment shall state that, unless the same is contested after service of citation, it shall be continued in force for such period of time as the court shall deem in the interest of the estate or person involved, or it shall be made permanent, if found by the court to be necessary.

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SECTION 147. ENFORCEMENT OF CLAIMS BY SUIT.

Any person having a debt or claim against the estate may enforce the payment of the same by suit against the independent executor; and, when judgment is recovered against the independent executor, the execution shall run against the estate of the testator in the hands of the independent executor which is subject to such debt. The independent executor shall not be required to plead to any suit brought against him for money until after one year from the date of the probate of the will appointing him. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 160. POWERS OF SURVIVING SPOUSE WHEN NO ADMINISTRATION IS PENDING.

When no one has qualified as executor or administrator of the estate of a deceased spouse, the surviving spouse, whether the husband or wife, as the surviving partner of the marital partnership, without qualifying as community administrator as hereinafter provided, has power to sue and be sued for the recovery of community property; to sell, mortgage, lease, and otherwise dispose of community property for the purpose of paying community debts; to collect claims due to the community estate; and has such other powers as shall be necessary to preserve the community property, discharge community obligations, and wind up community affairs. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 186. LETTERS OR CERTIFICATE MADE EVIDENCE.

Letters testamentary, of administration, or of guardianship, or a certificate of the clerk of the court which granted the same, under the seal of such court, that said letters have been issued, shall be sufficient evidence of the appointment and qualification of the personal representative of an estate or ward and of the date of qualification. Acts 1955, 54th Leg., p. 88, ch. 55.

SECTION 188. RIGHTS OF THIRD PERSONS DEALING WITH EXECUTORS OR ADMINISTRATORS.

When an executor or administrator, legally qualified as such, has performed any acts as such executor or administrator in conformity with his authority and the law, such acts shall continue to be valid to all intents and purposes, so far as regards the rights of innocent purchasers of any of the property of the estate from such executor or administrator, for a valuable consideration, in good faith, and without notice of any illegality in the title to the same, notwithstanding such acts or the authority under which they were performed may afterward be set aside, annulled, and declared invalid. Acts 1955, 54th Leg., p. 88, ch. 55.

Vernon's Civil Statutes of the State of Texas.

ARTICLE 1995. VENUE, GENERAL RULE.

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

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United States Code Annotated, Constitution.

ARTICLE IV. - STATES--RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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Federal Rules of Civil Procedure, 28 U.S.C.A.

RULE 13. COUNTERCLAIM AND CROSS-CLAIM.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the

transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

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(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

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RULE 25. SUBSTITUTION OF PARTIES.

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.

The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

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United States Code Annotated, Title 28.

SECTION 1738. STATE AND TERRITORIAL STATUTES AND JUDICIAL PROCEEDINGS: FULL FAITH AND CREDIT.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be

proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

26 U.S.C. 6013(e).

(e) Spouse Relieved of Liability in Certain Cases.

(1) In General. Under regulations prescribed by the Secretary or his delegate, if--

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return

he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission.

then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

(2) Special Rules. For purposes of paragraph (1)--

(A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and

(B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e)(1)(A).

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IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~1-802~~ 70-258

BETH KOEHLER DIEHL, ET AL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Samuel Williamson
Attorney for Petitioners
1320 Americana Building
Houston, Texas 77002

Donald G. Ritter, Pro se
Attorney at Law
502 Houston First Savings Building
Houston, Texas 77002

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

BETH KOEHLER DIEHL, ET AL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 18, 1971.

CITATIONS TO OPINIONS BELOW:

The opinion of the District Court, printed in Appendix A of the separate bound Appendice, is unreported. The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix B of the separate bound Appendice and is reported at 438 F. 2d 705.

JURISDICTION

1. The Judgment of the Circuit Court of Appeals was dated February 18, 1971, and it was entered on the same day.
2. The Order overruling the Motion for Rehearing was dated March 16, 1971.
3. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1346.

QUESTIONS PRESENTED

1. That full faith and credit should have been given to the judgment of the Probate Court, Harris County, Texas, appointing Beth Koehler Diehl as Independent Executrix of the Estate of Kent B. Diehl, Sr., and she should have been substituted in place of Kent B. Diehl, Sr., as one of the Plaintiffs.
2. That in the alternative that full faith and credit should have been given to the judgment of the Probate Court, Harris County, Texas, appointing Donald G. Ritter as Temporary Administrator of the Estate of Kent B. Diehl, Sr., and Donald G. Ritter should have been substituted as a Plaintiff in place of Kent B. Diehl, Sr.

STATUTES INVOLVED

The Statutory provisions involved are: Section 6 of the Texas Probate Code, Vernon's Texas Civil Statutes, Volume 17A, Probate Code; 28 U.S.C., Section 1738; and Article IV, Section 1 of the United States Constitution.

These statutes are printed in Appendix C of the separate bound appendice.

STATEMENT

This is a civil action for the recovery of federal income taxes for the calendar year 1957.

Kent B. Diehl, Sr., hereinafter called Mr. Diehl, and his wife, Beth Koehler Diehl, hereinafter called Mrs. Diehl, filed their 1957 joint income tax return with the District Director of Internal Revenue, Austin, Texas. The income reported in that return represented their community income. Thereafter Mr. Diehl filed a claim for refund for $5,546.21 for the calendar year 1957. On September 27, 1962, he filed his complaint in this cause based on his claim for refund. The Government filed a timely answer.

On December 17, 1962, the parties filed a joint motion for an order to stay proceedings requesting that the Trial Court stay all proceedings until disposition of the

criminal proceedings then pending against Mr. Diehl for alleged criminal tax violations and which cause was pending in the Trial Court. An order to that effect was entered.

On September 22, 1966, Mr. Diehl died and thereafter the criminal proceeding against him was dismissed.

On December 8, 1966, Mrs. Diehl, who at all times pertinent was a resident of Houston, Harris County, Texas, filed a "Motion of Intervention" alleging that she and Mr. Diehl filed a 1957 joint federal income tax return and paid the sum of $5,548.21 in tax with respect to that return, which amount represented community property of herself and Mr. Diehl. She further alleged that she was entitled to a portion of any income tax refund that may be recovered in that action and that she was an indispensable party to that

action. On December 12, 1966, the Trial Court entered an order granting her motion and permitting her individually to intervene as one of the plaintiffs in this cause. Thereafter she filed her pleadings entitled "Pleadings of Beth Koehler Diehl", wherein she adopted in it all of the pleadings which were previously filed in that cause by Mr. Diehl as if she had been a plaintiff when the original complaint was filed.

On February 13, 1967, Mrs. Diehl filed a motion that she, as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, be substituted as one of the plaintiffs in place of Mr. Diehl. In that motion she alleged that Mr. Diehl died September 22, 1966, and that she was appointed Independent Executrix of the Estate of Kent B. Diehl, Sr., hereinafter called estate, on January 24, 1967. The motion for substitution was not

opposed by the Government and an order was entered on February 20, 1967, granting the motion.

On August 2, 1967, the Government filed its first amended answer alleging a counterclaim against Mrs. Diehl individually and as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased. The counterclaim alleged that on July 21, 1967, the Government made an assessment against Mr. and Mrs. Diehl for federal income taxes, civil fraud penalties and interest in the amounts of $499,337.95, $249,688.97, and $277,625.06, respectively, for the calendar year 1957. Mrs. Diehl individually and as Independent Executrix of the Estate of Kent B. Diehl, Sr., Deceased, filed their answer to the Government's counterclaim.

In his complaint Mr. Diehl alleged that this was a civil action for the

recovery of federal income taxes and that the Trial Court had jurisdiction under Section 1346 of Title 28 of the United States Code. In the Government's answer it admitted that the plaintiffs' cause of action was a civil action for the recovery of federal income taxes and that the Trial Court had jurisdiction under Section 1346 of Title 28 of the United States Code.

On September 28, 1967, the Government mailed to Mrs. Diehl in her representative capacity a proof of claim for the alleged taxes, interest and penalties covered in their counterclaim.

On May 20, 1968, the Government filed its "Motion to Vacate and to Stay Proceedings" asking that the Trial Court enter an order vacating its order substitituting Mrs. Diehl as Independent Executrix of the Estate of Kent B. Diehl, Sr., in place of Mr. Diehl and further requesting the Trial

Court to stay all further proceedings until a proper and duly qualified legal representative of Mr. Diehl is appointed and is substituted in place of Mr. Diehl. The Government's motion was filed by Mr. John O. Jones, Attorney, Tax Division, Department of Justice, hereinafter called Jones. The Government's motion outlined the history of the proceeding in this cause up to that time and then alleged that in connection with the application to probate the will of Mr. Diehl in the Probate Court, Harris County, Texas, that Mrs. Diehl, through her attorney, Dougal C. Pope, hereinafter called Pope, made the following allegations of material fact which were allegedly false and fraudulent and were allegedly made knowingly and willfully:

(a) That Mr. Diehl was domiciled in Harris County, Texas, at the time of his death.

(b) That Mrs. Diehl was the wife of

Mr. Diehl at the time of his death and that she is the widow of Mr. Diehl.

(c) That Mr. Diehl was never divorced.

(d) That Mrs. Diehl is not disqualified by law from accepting letters testamenary in and for the Estate of Kent B. Diehl, Sr., Deceased.

The motion further alleged that Mrs. Diehl was appointed Independent Executrix of the said estate because of the alleged false and fraudulent statements and that said order of the Probate Court appointing her as Independent Executrix was invalid. The motion further alleged that Mr. and Mrs. Diehl obtained an alleged mexican divorce on October 28, 1959, and that thereafter Mr. Diehl allegedly married Carmen Ramsey Diehl. The motion further alleged that Mr. Diehl was a resident of Glendale, California, at the time of his death and that Mrs. Diehl

and Pope knew of all of these facts when the application to probate the will was filed in the Probate Court, Harris County, Texas.

The Government's motion to vacate and to stay proceedings was supported by an affidavit of Mr. John O. Jones, hereinafter called Jones, the attorney for the Government.

In his affidavit Jones stated that he had been assigned this case for handling and had checked the files and had made certain investigations and that:

> "The information and assertions of fact contained in the motion are true and correct to the best of my knowledge, information, and belief. These assertions of fact are based upon my study of the files furnished to me, my investigation of this case conducted

in conjunction with the preparation of the same for trial, and my instructions given to other Government personnel regarding certain actions to be taken in this case.

"Based upon my study, investigation, and instructions, I believe the following to be a true and correct statement of facts:..."

In his affidavit Jones outlined the proceedings which had occurred in this cause and stated that on December 13, 1966, that Mrs. Diehl through Pope filed in the Probate Court, Harris County, Texas, in cause No. 94,261 an application for her to be appointed Administratrix of the Estate of Kent B. Diehl and stated the following in her application:

(a) That on the 22nd day of September, 1966, the deceased (Kent B. Diehl,

Sr.) died intestate and based on the applicant's understanding of the law his domicile was Harris County, Texas.

(b) That at the time of his death, the said deceased was seized and possessed of personal property of the probable value of $3000.00 which represents a claim against Internal Revenue Service for overpayment of income taxes for the year 1957.

(c) That there is a necessity for administration of the estate of the deceased because at the present time there is a suit pending in the United States District Court, Eastern District of Texas, Beaumont Division, in Civil Action No. 4662 in the cause of Kent B. Diehl, Sr. vs. United States of America, which

is the suit in connection with the above mentioned income tax refund and it is necessary that there be a substitution of parties in connection with that cause of action.

(d) That your applicant, based on her understanding of the law, is the wife of the deceased and she is entitled to letters of administration.

(e) That your applicant is not disqualified by law to act as Administratrix.

The affidavit further states that on January 9, 1967, that Pope amended his application for administration and filed a will of Mr. Diehl and asked that the will be admitted to probate as the last will and testament of Mr. Diehl and that Mrs. Diehl be appointed Independent Executrix of his estate.

The said application stated among other things the following:

(a) That the domicile of the deceased (Kent B. Diehl, Sr.) was Harris County, Texas, based on applicant's understanding of the law.

(b) That the principal part of deceased's property at the time of his death was personal property of the probable value of $3,000.00 which represents a claim against Internal Revenue Service for overpayment of income taxes.

(c) That the applicant is the wife of the deceased.

(d) That applicant is not disqualified by law from accepting letters testamentary in said estate. That the deceased was never divorced.

In Jones' affidavit he alleged that Mr. and Mrs. Diehl obtained an alleged mexican

divorce and attached as exhibits all of the papers filed in that proceeding. Jones also stated that Mr. Diehl and Carmen Ramsey were married in Missouri on November 26, 1959, and attached as an exhibit the alleged marriage license. Jones further stated that Mr. Diehl executed a last will and testament on December 31, 1959, wherein he declared that he was a resident of Pittsburg, Crawford County, Kansas, and that his property was left to his wife, Carmen Ramsey Diehl, and a copy of the alleged will was attached as an exhibit. Jones' affidavit further states that Mr. Diehl and Carmen Ramsey Diehl left Pittsburg, Kansas, in 1961 and moved to Glendale, California, where they were living as alleged husband and wife on September 22, 1966, when he died at the Glendale Memorial Hospital, Glendale, California.

Jones' affidavit further alleges that attached to his affidavit are copies of Mrs. Diehl's federal income tax returns for the years 1959 through 1966 and that each of these returns were prepared by Pope. On each of these returns for the years 1959 through 1965 in answer to the question as to the marital status of the taxpayer, the following was put on each return by Pope: "Due to the complexity of the law, taxpayer does not know the answer to this question" or words of similar meaning.

The Trial Court entered an order granting the Government's motion that Mrs. Diehl could not represent Mr. Diehl in her representative capacity and that all proceedings were stayed until a proper party was substituted in place of Mrs. Diehl.

On June 5, 1968, plaintiffs filed their Motion to Strike certain portions of the affidavit of Jones because there were no

facts in the affidavit to show that the statements were based on Jones' personal knowledge. The Motion to Strike asked that all statements of Jones relative to the following be stricken because they were not based on Jones' personal knowlege: that Mr. Diehl left Harris County, Texas, and moved his residence to Pittsburg, Crawford County, Kansas, where he resided until the year 1961, that Mr. Diehl and Carmen Ramsey were married in Missouri on November 26, 1959, that Mr. Diehl executed a last will and testament on December 31, 1959, and the alleged contents of same, that Mr. Diehl and Carmen Ramsey Diehl left Pittsburg, Kansas, during the year 1961 and moved their permanent residence to Glendale, California, and that at the time of Mr. Diehl's death that he and Carmen Ramsey Diehl were married and residing together as husband and wife in Glendale,

California. Also the plaintiff asked that the following statements be stricken because they were no more than legal conclusions on the part of Jones: that Mrs. Diehl and Mr. Diehl were divorced in October, 1959; that Mr. Diehl was not a resident of the State of Texas at the time of his death, that Mr. Diehl was married to Carmen Ramsey Diehl at the time of his death, and that Mr. Diehl had executed a last will and testament subsequent to the one which was filed for probate by Mrs. Diehl.

Plaintiffs filed an answer to the Defendant's motion to vacate and stay proceedings which had attached an affidavit of Mrs. Diehl stating the facts surrounding the alleged mexican divorce. She stated in her affidavit that she and Mr. Diehl went to Juarez, Mexico, for the specific purpose of obtaining a Mexican divorce and they stayed in Mexico for about five or six hours

on October 27, 1959, and that she signed a power of attorney so that a Mexican attorney could represent her. She stated that she did not go into any courtroom in connection with the alleged divorce and that her only purpose in going to Juarez, Mexico, was to stay there long enough to get the divorce and that she returned to Orange, Texas, where she resided, after she left Mexico, and that was her intention when she went to Mexico. Mrs. Diehl further stated that she had discussed her alleged Mexican divorce with at least four Houston, Texas, attorneys and each of them told her that they did not think that the alleged divorce was any good but that they could be wrong and that each of them told her that if she ever intended to remarry that she should get a Texas divorce.

The plaintiffs attached copies of the application for administration and application

for probate of Mr. Diehl's will to their answer. Also plaintiffs pointed out that the judgment of the Probate Court admitting Mr. Diehl's will to probate and appointing her as Independent Executrix of his estate was required to be given full faith and credit by the Trial Court; Section 1, Article IV of the United States Constitution and 28 U.S.C. Section 1738. Also it was pointed out that if the defendant felt that the Texas Probate Court had rendered a wrong decision that the Texas statute provided for several remedies to attack Probate Court judgments which are Right of Appeal, Section 28 of the Texas Probate Code, Vernon's Texas Civil Statutes, Volume 17A, Certiorari, Section 30 of the Texas Probate Code, Bill of Review, Section 31 of the Texas Probate Code, and that the Government was an interested person, Section 3(r) of the Texas Probate Code, and that there was a two year

period for contesting probate, Section 93 of the Texas Probate Code and that the two year period had not expired at that time. Plaintiffs suggested that the Government be required to pursue their remedies in the Texas State Courts and that the proceedings be stayed in the Trial Court until the Government could pursue their remedy in the State Court.

On November 25, 1968, the Trial Court entered a Memorandum Opinion and Order which affirmed its prior order that Mrs. Diehl as Independent Executrix of the Estate of Kent B. Diehl was not recognized as a party in place of Mr. Diehl and that all proceedings in the case be stayed until a proper party was substituted in place of Mr. Diehl.

In general, the Memorandum Opinion dated November 25, 1968, found as a fact the statements made by Jones in his affidavit and found that the statement as to

Mr. Diehl's domicle being in Texas as contained in the application to probate the will was false and that Mrs. Diehl was estopped to question the validity of the Mexican divorce and that the Texas Probate Court did not have jurisdiction to probate Mr. Diehl's will. The Trial Court further held that Mrs. Diehl and her attorney, Pope, in effect perpetrated a fraud on the Harris County Court and upon the Trial Court.

On January 27, 1969, the Government filed a Suggestion of Death Upon the Record in which under the provisions of Rule 25(a)(1) of the Federal Rules of Civil Procedure the death of Mr. Diehl was noted.

On February 17, 1969, Donald G. Ritter, hereinafter called Ritter, filed a Motion and Order that Donald G. Ritter, Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, be Substituted as One of the

Plaintiffs in Place of Kent B. Diehl, Sr. In that motion Ritter stated that he was appointed Temporary Administrator of the Estate of Kent B. Diehl, Sr., Deceased, on January 30, 1969, and Ritter attached to that motion as exhibits the papers which had been filed in the Probate Court No. 2, Harris County, Texas, in connection with his appointment. The order of the Probate Court appointing Ritter as Temporary Administrator gave him authority to be substituted as a party in place of Mr. Diehl in this cause and that he had authority to do any and all acts necessary in connection with this matter until the said cause is terminated, whether in the Trial Court or by appeal.

The Government did not oppose Ritter's motion to be substituted in his representative capacity in place of Mr. Diehl. The Trial Court granted Ritter's motion on

April 8, 1969. Thereafter, on April 18, 1969, Ritter filed his pleadings in this cause.

On October 31, 1969, without any notice to the plaintiffs, the Trial Court entered its Memorandum Opinion and Order which held that Ritter in his representative capacity was not a proper party to be substituted in place of Mr. Diehl. The Trial Court held that the Probate Court did not have jurisdiction to appoint Ritter as Temporary Administrator and, therefore, the appointment is void and not entitled to full faith and credit from the Trial Court. The Memorandum Opinion further held that the plaintiffs' action as well as the Government's counterclaim should be dismissed for want of jurisdiction of the Trial Court. An order to that effect was entered.

In general, the Appellate Court upheld the Trial Court and further found that as

to the appointment of Ritter that the power of a Temporary Administrator under Section 6(e) of the Texas Probate Code was for the purpose only of receiving money due an estate and that the power to collect the money was outside the realm of Section 6(e) of the Texas Probate Code and, therefore, Ritter's appointment was void. Also that Court held that Section 6(e) of the Texas Probate Code was not intended to allow strangers (Ritter) to administer an estate which would not have any assets in Texas.

ARGUMENT

1.

THAT FULL FAITH AND CREDIT SHOULD HAVE BEEN GIVEN TO THE JUDGMENT OF THE PROBATE COURT, HARRIS COUNTY, TEXAS, APPOINTING BETH KOEHLER DIEHL AS INDEPENDENT EXECUTRIX OF THE ESTATE OF KENT B. DIEHL, SR., AND SHE SHOULD HAVE BEEN SUBSTITUTED IN PLACE OF KENT B. DIEHL, SR., AS ONE OF THE PLAINTIFFS

The pertinent statutes are set forth in the separate bound Appendice.

After Mr. Diehl's death, Mrs. Diehl applied to the Probate Court of Harris County, Texas, for probate of Mr. Diehl's will. After a hearing on her application, the Texas Probate Court admitted the will to probate and appointed her as Independent Executrix of Mr. Diehl's estate. She applied to the Trial Court to be substituted in her representative capacity in place of Mr. Diehl and her motion was granted. Later the Trial Court refused to recognize her in her representative capacity as the

representative of Mr. Diehl's estate and held that she in her representative capacity was not a proper party to be substituted in place of Mr. Diehl and held that the Probate Court did not have jurisdiction to appoint her as Independent Executrix of Mr. Diehl's estate.

The Trial Court refused to recognize Mrs. Diehl in her representative capacity because it said that Mrs. Diehl and her attorney practiced fraud on the Probate Court in that Mrs. Diehl was not married to him when he died and that Mr. Diehl was not a resident of Texas when he died.

Mrs. Diehl first applied to the Probate Court for an administration of Mr. Diehl's estate. In her application, she stated that her residence and domicile was Harris County, Texas, that Mr. Diehl died September 22, 1966, intestate and "based on the applicant's understanding of the

law his domicile was Harris County, Texas", that based "upon her understanding of the law she is the wife of Mr. Diehl", that his property consisted of the claim involved in this suit of the value of about $3,000.00, that it was necessary for an administration because it was necessary for there to be a substitution of parties in this cause, and that she was not disqualified to act as administratrix.

Prior to the hearing on her application for administration, Mrs. Diehl found a will of Mr. Diehl which she believed to be the last will and testament of Mr. Diehl. She thereupon filed in the same Probate Court under the same cause number her application to probate will and for letters testamentary alleging that she had found a will of Mr. Diehl since she filed her application for administration and that she was now filing the application to probate the

will, that her domicile is Harris County, Texas, that Mr. Diehl died September 22, 1966, "that the domicile of the deceased was Harris County, Texas, based on applicant's understanding of the law", that the principal part of deceased's property was a claim against Internal Revenue Service for overpayment of income taxes in the amount of $3,000.00, that the deceased died testate, and that Mrs. Diehl was his wife and that Mr. Diehl had never been divorced.

A hearing was had on the application to probate the will and the Probate Court of Harris County, Texas, entered an order on January 24, 1967, admitting the will to probate and appointing Mrs. Diehl as Independent Executrix of his estate.

On February 13, 1967, Mrs. Diehl filed in her representative capacity in the Trial Court a motion that she be substituted in

place of Mr. Diehl and stated in her motion that Mr. Diehl died September 22, 1966, and that on January 24, 1967, that she was appointed Independent Executrix of his estate. This motion was not opposed by the Government and the Trial Court entered an order on February 20, 1967, substituting her in her representative capacity in place of Mr. Diehl.

Petitioners submit that the Probate Court had jurisdiction to appoint Mrs. Diehl as Independent Executrix of Mr. Diehl's estate and the Trial Court was required to give full faith and credit to the judgment of the Probate Court, Article IV, Section 1, United States Constitution, 28 U.S.C. Sec. 1738, and Hanley v. Donoghue, 116 U.S. 1, 6 S. Ct. 242, 244.

As to the alleged mexican divorce, Mrs. Diehl's affidavit which was attached as Exhibit E to the Plaintiff's Answer to

Defendant's Motion to Vacate and Stay Proceedings states that she and Mr. Diehl went to Mexico for the purpose of obtaining a Mexican divorce and they were there about five or six hours and that after signing some papers that they came back to the United States and that she went back to her residence in Orange, Texas, and that her intention was to stay in Mexico only as long as was necessary to get the divorce and that is what she did. She stated that she never went into a courtroom in Mexico. Mr. and Mrs. Diehl went to Mexico on October 27, 1959, and the divorce was granted the next day. Mrs. Diehl's affidavit shows that she did not establish any residence or domicile in Mexico and that she never had any intention of establishing any domicile or residence in Mexico. Therefore, the alleged Mexican divorce is a nullity and Mrs. Diehl and Mr. Diehl were

legally and lawfully married when he died.

In Jones v. Bartlett, 189 S.W. 1107, (Tex. Civ. App., 1916) error refused, the question was whether an Oklahoma divorce was entitled to full faith and credit in the courts of the State of Texas. The evidence was to the effect that the husband went to Oklahoma only for the purpose of obtaining a divorce in Oklahoma. In holding that the husband had not established a domicile in Oklahoma, the Texas court held that the Oklahoma divorce decree was void and unenforceable in Texas.

In the case of Richmond v. Sangster, (Tex. Civ. App., 1919) 217 S.W. 723, error refused, the Court said on page 729:

> "...The rule in such case is that mere going to a state for the purpose of securing a divorce and residing there the required length of time but without any intention of remaining there permanently or indefinitely is not sufficient to give jurisdiction in divorce proceedings...."

To the same effect, Burke v. Burke, (Tex. Civ. App., 1953) 255 S.W. 2d 908; and Callicoatte v. Callicoatte, (Tex. Civ. App., 1959) 324 S.W. 2d 81, refused n.r.e.

In the case of Bell v. Bell, 21 S. Ct. 551, the question was whether a Pennyslvania divorce was valid which was obtained by the husband who had his residence in the State of New York. This Court held that since the husband had not established his domicile in the State of Pennsylvania that the divorce decree was not entitled to full faith and credit in the State of New York.

The Trial Court held in its Memorandum Opinion dated November 25, 1968, that it was unnecessary to pass on the validity of the Mexican divorce, for it is clear that the taxpayer (Mrs. Diehl) is estopped from challenging the validity of the Mexican divorce.

The doctrine of estoppel is not

available to third parties who were not parties to the transaction and the doctrine of estoppel is not available to the Government in this case.

In 22 Tex. Jur. 2d, Estoppel, page 660, says:

I. Introductory

Section 1. Definition.

The broad concept of estoppel is that one who by his speech or conduct has induced another to act in a particular manner ought not to be permitted to adopt an inconsistent position, attitude or course of conduct and thereby cause loss or injury to the other. In other words, he who by his language or conduct leads another to do what he would not otherwise have done must not subject the other to loss or injury by disappointing the expectations on which the latter acted.

****

Section 2. Nature and purpose.

Estoppel is equitable in nature. Its purpose is to prevent inconsistency and fraud resulting in injustice, and to protect those who have been misled by that which on its face was fair.

An estoppel is defensive in character

and does not in itself create a new right or cause of action. An estoppel cannot be invoked as an instrumentality for gain or profit; it operates only to protect the person invoking it in a right previously acquired, or from a loss already inflicted.

The principal of estoppel is ordinarily not applicable to the state or to a political subdivision while it is acting in aid of the state's sovereign powers.

22 Tex. Jur. 2d, Estoppel, page 664, says:

II. Estoppel in Pais or Equitable Estoppel

A. Generally

Section 4. In general.

Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting the rights that might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who has, in good faith, relied on that conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.

In Cone v. Cone, 266 S.W. 2d 480, (Tex. Civ. App., 1953) the Court said on page 482:

"....'Mutuality being requisite, an estoppel operates neither in favor of, nor against, strangers --this is persons who are neither parties nor privies to the transaction out of which the estoppel arose....'"

See also Buckner Orphans Home v. Berry, 332 S.W. 2d 771, (Tex. Civ. App., 1960) Ref., N.R.E., which held that an estoppel operates only on the parties to a transaction and their privies and not as to strangers to the transaction.

In Campbell v. Campbell, 362 S.W. 2d 904, (Tex. Civ. App., 1962), the Court said on page 909:

"In Judgments, 33 Tex. Jr. 2d, Sec. 104, p. 622, the rule is stated:

"'Generally, a party may not complain of a judgment rendered by consent or agreement, and such a judgment waives all errors committed before its rendition except those that involve the jurisdiction of the court.'"

See 86 A.L.R., page 88, which says that the Texas cases uniformly hold that a

judgment by consent cures every character of error except fundamental error going to the jurisdiction of the court. Lessing v. Cunningham, (1881) 55 Tex. 231. See also Duke v. Gilbreath, 10 S.W. 2d 412, (Tex. Civ. App., 1928) error refused, to the same effect.

Since the Mexican court never acquired jurisdiction over Mr. and Mrs. Diehl, then the alleged divorce is void and Mr. and Mrs. Diehl were husband and wife when he died.

Shortly after the alleged Mexican divorce, Mrs. Diehl moved to Houston, Harris County, Texas, and thereafter her residence was Houston, Texas.

During about the year 1959 or 1960 Internal Revenue Service began checking the 1955 through 1957 income tax returns of Mr. and Mrs. Diehl and Internal Revenue later recommended that criminal prosecution

be brought against Mr. Diehl for each of the years 1955 through 1957. During about 1962, Mr. Diehl was indicted for alleged income tax evasion for the years 1956 and 1957. During about the year 1959 or 1960, Mr. Diehl engaged Pope to represent him on the alleged criminal proceeding which Internal Revenue was conducting. Mr. Diehl left all of his records for those years with Pope and from the time that he was indicted until his death he made a number of trips from California to Houston, Texas, in connection with this criminal matter. Mr. Diehl had a heart condition and a number of continuances were obtained in the criminal case. He later died of a heart attack.

In Covington v. Eskridge, 430 S.W. 2d 589, (Tex. Civ. App., 1968) on a plea of privilege case in which the defendant has the right to be sued in the county of

his residence (Article 1995, Texas Vernon's Annotated Civil Statutes), the defendant alleged that he was domiciled in Chicago, Illinois, but that he had business interest in Texas and that during the transaction of his business that they resided in Harris County, Texas, which is his residence. On page 590 the Court said:

> "The word 'domicile' as used in our venue statute, Article 1995, Vernon's Ann. Civ. St., has been held to mean 'residence,' which is 'a lesser-included element within the technical definition of domicile.' Snyder v. Pitts, 150 Tex. 407, 241 S.W. 2d 136, 139 (1951). It is, therefore, possible for a person to have a domiciliary residence in Illinois and a second or 'venue residence' in Texas. Taylor v. Wilson, 99 Tex. 651, 93 S.W. 109 (1906). A resident of Texas, though he be a citizen of, and have a residence in, another State, may invoke the privileges conferred by our venue laws. Gulf, C. & S. F. R. Co. v. Rogers, 37 Tex. Civ. App. 99, 82 S.W. 822 (Houston 1903, writ ref'd).
>
> "We believe that the allegations in the plea of privilege, as

'supplemented,' were sufficient to bring defendants within the protection of the 'second residence' rule recognized in Snyder, Taylor and Rogers...."

In Snyder v. Pitts, 241 S.W. 2d 136, (Supreme Court of Texas, 1951) the question was whether a defendant had established a second residence apart from his domicile within the meaning of Article 1995, Texas Vernon's Annotated Civil Statutes. That Court said that on the question of the second residence, page 140, "....the presence of the wife living in a second place of abode is certainly evidence of the establishment of a second residence apart from a domicile,..." On page 142 the Court said that "Statutes regulating the local venue of legal proceedings are generally designed to provide for the convenience of the parties involved...."

For several years prior to Mr. Diehl's death, Mrs. Diehl's residence was Harris

County, Texas. Also from the time that he was indicted until his death, Mr. Diehl's main concern or his main business concern was the defense of the criminal case. His records were maintained in Pope's possession in Harris County, Texas, and Harris County, Texas, was his headquarters in connection with this defense of his criminal case. He made trips from California to Houston, Texas, for the purpose of the defense of the criminal case. Therefore, Houston, Harris County, Texas, was his second residence or his residence in Texas.

The Trial Court did not have jurisdiction in refusing to recognize Mrs. Diehl in her representative capacity since Federal Courts are without jurisdiction over matters which are strictly probate and for the administration of an estate. It has been consistently held that a Federal Court does not have such power but that those matters

are reserved to the state courts.

In Byers v. McAuley, 149 U.S. 608, 13 S. Ct. 906, this Court had before it the jurisdiction of a Federal Court over the administration of an estate. This Court held that the Federal Court would not have jurisdiction over matters which are strictly probate and for the administration of an estate and that an administrator of an estate was an officer of the State Court and that a Federal Court could not have jurisdiction to disturb possession of the estate. This Court further held that the administration laws are not merely rules of practice but laws limiting the rights of parties and will be observed by the Federal Courts. See Mitchell v. Nixon, 200 F. 2d 50, (Fifth Circuit, 1952); Strickland v. Peters, 120 F. 2d 53, (Fifth Circuit, 1941); White v. Keown, 261 F. 814, (USDC, Massachusetts, 1919); Wells v. Helms,

105 F. 2d 402, (Tenth Circuit, 1939); Princess Lida of Thurn and Taxis, et al v. Thompson, et al, 305 U.S. 456, 59 S. Ct. 275, 277, 83 L. Ed. 285; Feist v. Fidelity Union Trust Co., 29 F. Supp. 51, (USDC, New Jersey, 1939); Akin v. Louisiana National Bank of Baton Rouge, 322 F. 2d 749, (Fifth Circuit, 1963); Newhouse v. Canal National Bank of Portland, 94 F. Supp. 830, (USDC, Maine, 1950) to the same effect.

The venue of probate proceedings as fixed by Section 6 of the Texas Probate Code is jurisdictional, White v. Baker, 118 S.W. 2d 319, (Tex. Civ. App., 1938).

Section 6 of the Texas Probate Code provides:

> Section 6. Venue for Probate of Wills and Administration of Estates of Decedents.
>
> Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:

(a) In the county where the deceased resided, if he had a domicile or fixed place of residence in this State.

****

(c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where his nearest of kin reside.

(d) But if he had no kindred in this State, then in the county where his principal estate was situated at the time of his death.

(e) In the county where the applicant resides, when administration is for the purpose only of receiving funds or money due to a deceased person or his estate from any governmental source or agency; provided, that unless the mother or father or spouse or adult child of the deceased is applicant, citation shall be served personally on the living parents and spouses and adult children, if any, of the deceased person, or upon those who are alive and whose addresses are known to the applicant. Acts 1955, 54th Leg., p. 88, ch. 55.

In the event that Mr. Diehl was not a resident of Harris County, Texas, the Texas Probate Court would have had jurisdiction over his estate under Section 6(c) of the

Texas Probate Code since Mrs. Diehl was a resident of Harris County, Texas, and she was his nearest of kin in Texas. Black's Law Dictionary, Third Edition, page 1242 says: "The words 'next of kin', used simpliciter in a deed or will, means not nearest of kindred, but those relatives who share in the estate according to the statute of distributions, including those claiming per stirpes or by representation. Slosson v. Lynch, 43 Barb. (N.Y.) 147."

As far as Mrs. Diehl knows, the only assets of Mr. Diehl's estate was the claim against the Government for his income tax overpayment for the year 1957 and the only purpose of the administration was for the purpose of a substitution of parties in the Trial Court. Therefore, the Probate Court would have had jurisdiction over Mr. Diehl's estate under the provisions of Section 6(e) of the Texas Probate Code.

Section 8(e) of the Texas Probate Code provides that the court in which the application for probate has been filed shall have full jurisdiction to determine the venue of such proceedings and its determination shall not be subject to collateral attack. What the Trial Court has done is to collaterally attack the judgment of the Texas Probate Court appointing Mrs. Diehl as the Independent Executrix of Mr. Diehl's estate which it does not have jurisdiction to do.

In the case of Akin v. Louisiana National Bank of Baton Rouge, supra, the Fifth Circuit held on page 753 that under Louisiana law a probated testament may be annulled only by a direct action brought in the succession proceeding. The Texas law is to the same effect that a will may be set aside only in a direct proceeding and not by a collateral attack. Halbert v.

DeBode, 28 S.W. 58, (Tex. Civ. App.); Locust v. Randle, 102 S.W. 946, (Tex. Civ. App.); Volkmer v. Chase, 354 S.W. 2d 611, (Tex. Civ. App.) Reh. Den., err. ref., NRE.

In Akers v. Simpson, 445 S.W. 2d 957, (Supreme Court of Texas, 1969), that Court held that a judgment could not be collaterally attacked and that the jurisdictional recitals import absolute verity.

If the Government felt that the judgment rendered in the Probate Court was wrong, they had ample opportunity to go into the Texas Courts. The Government was an interested person, Section 3(r) of the Texas Probate Code, since they had filed their claim for income taxes against the estate with Mrs. Diehl in her representative capacity. The Government could have contested the Probate Court judgment by any one or more of the Right of Appeal, Section 28 of the Texas Probate Code, Certiorari, Section

30 of the Texas Probate Code, and Bill of Review, Section 31 of the Texas Probate Code, and the Government had two years in which to do this, Section 93, Texas Probate Code. This was pointed out in the Petitioners' answer to the Government's motion to vacate and stay proceedings and at that time the two years had not expired.

Even if Mrs. Diehl was not the proper representative of Mr. Diehl's estate, then she would have had authority to represent Mr. Diehl as the community survivor under Section 160 of the Texas Probate Code. Section 160 gives the surviving spouse power to sue for community property and to collect claims due the community.

The Trial Court did not have sufficient evidence to enter its Memorandum Opinion dated November 25, 1968, holding that Mrs. Diehl was not the representative of Mr. Diehl's estate. The facts in this Memorandum

Opinion were based on the main on the affidavit of Jones. Jones' affidavit was not based on his personal knowledge and he would not have been competent to testify as to many of the alleged facts in his affidavit. The Petitioners filed a motion to strike portions of Jones' affidavit which motion to strike should have been granted. Therefore, the Memorandum Opinion was not based on sufficient evidence and it should not have been entered.

THAT IN THE ALTERNATIVE THAT FULL FAITH AND CREDIT SHOULD HAVE BEEN GIVEN TO THE JUDGMENT OF THE PROBATE COURT, HARRIS COUNTY, TEXAS, APPOINTING DONALD G. RITTER AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF KENT B. DIEHL, SR., AND DONALD G. RITTER SHOULD HAVE BEEN SUBSTITUTED AS A PLAINTIFF IN PLACE OF KENT B. DIEHL, SR.

After the Government filed their suggestion of death of Mr. Diehl, Ritter applied to the Probate Court, Harris County, Texas, to be appointed Temporary Administrator of Mr. Diehl's estate. In that application Ritter complied with the provisions of Section 6(e) of the Texas Probate Code which provided for jurisdiction and venue over Ritter's application. Temporary administration is provided for under Section 131 of the Texas Probate Code. The basis of Ritter's application was that it was for the purpose only of receiving funds or money due to Mr. Diehl from the Government. Ritter asked that he have authority to be substituted in

place of Diehl in the Trial Court and to do anything necessary in connection with this suit. After a hearing on Ritter's application, the Probate Court appointed him Temporary Administrator over Mr. Diehl's estate and gave him full authority to do what was necessary to be substituted in place of Mr. Diehl in this cause and to do any other acts in connection with this cause of action.

On February 17, 1969, Ritter filed his motion in the Trial Court that he be permitted to be substituted in place of Mr. Diehl. The Government did not oppose that motion and so the Trial Court on April 8, 1969, entered an order substituting Ritter in his representative capacity in place of Mr. Diehl. Thereafter Ritter filed his pleadings.

On October 31, 1969, without any notice to the Petitioners, the Trial Court entered

a Memorandum Opinion and Order holding that Ritter was not a proper party to be substituted in place of Mr. Diehl and that the Probate Court did not have jurisdiction to appoint Ritter as Temporary Administrator. The Petitioners' claim and the Government's counterclaim was dismissed for want of jurisdiction.

The argument and authorities under the first point as to full faith and credit, that the Federal Courts do not have jurisdiction over matters which are strictly probate and for the administration of estates, and that a state court judgment can't be collaterally attacked would be applicable to this point and will not be repeated.

The Fifth Circuit held that under the provisions of Section 6(e) of the Texas Probate Code, the statute under which Ritter was appointed, that a temporary administrator is appointed for the purpose only of

receiving funds or money due to a deceased person or his estate from any governmental source or agency and that this would not include the right of the temporary administrator to collect these funds. However, it is submitted that the right to receive funds necessarily includes the right to collect these funds and to do whatever acts are necessary in collecting these funds. This holding of the Fifth Circuit is directly opposite to the holding of the Texas Probate Court in appointing Ritter as Temporary Administrator as that Court gave Ritter authority to do what was necessary to be substituted in place of Mr. Diehl in this cause and to do any and all acts in connection with this cause of action.

It would appear that the action of the Appellate Court is in direct violation of the teachings of this Court in Younger v. Harris, 91 S. Ct. 746 (February 23, 1971),

and Samuels v. Mackell, 91 S. Ct. 764, (February 23, 1971), which held that the Federal Courts should let the State Courts interpret the state statutes if the proceedings had been initiated in the State Courts at the time that the action was filed in the Federal Court. These two cases applied to criminal matters but Great Lakes Co. v. Huffman, 319 U.S. 293 (1943), applied the same principal to a civil matter.

Since the Government is questioning the validity of Mrs. Diehl's appointment and Ritter's appointment in the State Court and since the Government could have challenged the validity of these appointments in the Texas courts, then the Federal Court should have required the Government to proceed in the State Courts.

Petitioners submit that as an equitable matter in this case that Mrs. Diehl

should have the right of a trial in the Trial Court. The Government has assessed over a million dollars in taxes, penalties and interest in this matter which, if the assessment is valid, has two more years to run before the six year statute of limitation will apply on this assessment. After the Trial Court entered its order and while this case was on appeal to the Fifth Circuit, Congress enacted Act 26 U.S.C. Section 6013(e) which, in general, provides that if a husband and wife have filed a joint return which involves an alleged fraud penalty and on which at least 25% of the income has been understated on the return and if one of the spouse is innocent as to the alleged omitted income and the alleged fraud that the innocent spouse will not be liable for the tax on the omitted income and the alleged fraud penalty. It is submitted that Mrs. Diehl

would come under the provisions of Section 6013(e) of the Internal Revenue Code of 1954 in that on a trial of this case the most that she would be liable for would be approximately $2400.00 additional income tax and the accrued interest thereon which would amount to approximately $2000.00, or a total amount of $4400.00. Because the statute prevents injunctions against the collection of income taxes except in extraordinary circumstances and because Mrs. Diehl would never under any circumstances be able to pay the million dollar assessment prior to filing a claim for refund, then the net effect will be that, assuming the assessment is valid, that she will have an assessment of over a million dollars where she would not be liable for any more than a maximum of $4400.00.

Therefore, in the interest of justice she would be entitled to a trial in the Trial Court.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to reverse the decision of the United States Court of Appeals and hold that Mrs. Diehl should have been substituted in place of Mr. Diehl in her representative capacity and that in the alternative that Ritter should have been substituted in his representative capacity in place of Mr. Diehl.

Respectfully submitted,

Samuel Williamson
Attorney for Petitioners
1320 American Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I, Samuel Williamson, the attorney for Petitioners, hereby certify that on the 8th day of June, 1971, I served copies of the foregoing Petition for Writ of Certiorari and the separately bound Appendice on the several parties thereto as follows:

1. On the United States by mailing a copy in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530, and by mailing a copy in a duly addressed envelope with air mail postage prepaid to Mr. Johnnie M. Walters, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530.

Samuel Williamson

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-258

BETH KOEHLER DIEHL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (Pet. App. 1-A to 30-A; 31-A to 40-A) are not yet reported. The opinion of the court of appeals (Pet. App. 1-B to 21-B) is reported at 438 F.2d 705.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22-B to 23-B) was entered on February 18, 1971, and a petition for rehearing was denied on March 16, 1971 (Pet. App. 24-B). The petition for a writ of certiorari was filed on June 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

438-102—71

QUESTION PRESENTED

Whether either petitioner Diehl or petitioner Ritter could be substituted for the decedent as plaintiff in a suit the decedent had instituted for refund of federal income taxes.

STATUTES AND RULE INVOLVED

The pertinent provisions of the Texas Probate Code, Vernon's Tex. Civil Stat. Ann., are as follows:

> Section 6. Venue for Probate of Wills and Administration of Estates of Decedents
>
> Wills shall be admitted to probate, and letters testamentary or of administration shall be granted:
>
> (a) In the county where the deceased resided, if he had a domicile or fixed place of residence in this State.
>
> (b) If the deceased had no domicile or fixed place of residence in this State but died in this State, then either in the county where his principal property was at the time of his death, or in the county where he died.
>
> (c) If he had no domicile or fixed place of residence in this State, and died outside the limits of this State, then in any county in this State where his nearest of kin reside.
>
> (d) But if he had no kindred in this State, then in the county where his principal estate was situated at the time of his death.
>
> (e) In the county where the applicant resides, when administration is for the purpose only of receiving funds or money due to a deceased person or his estate from any governmental source or agency; provided, that unless the mother or father or spouse or adult child

of the deceased is applicant, citation shall be served personally on the living parents and spouses and adult children, if any, of the deceased person, or upon those who are alive and whose addresses are known to the applicant. * * *

Section 69. Voidness Arising From Divorce

If the testator is divorced after making a will, all provisions in the will in favor of the testator's spouse so divorced, or appointing such spouse to any fiduciary capacity under the will or with respect to the estate or person of the testator's children, shall be null and void and of no effect. * * *.

Rule 25 of the Federal Rules of Civil Procedure provides in pertinent part:

Substitution of Parties

(a) *Death.*

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

* * * * *

STATEMENT

Kent B. Diehl, Sr., instituted this action in 1962 for the refund of federal income taxes in the amount of $5,548.21. After his death in 1966, the district court allowed petitioner Beth Koehler Diehl to intervene as plaintiff on the ground that she and the decedent had filed a joint return for the year in question and that the taxes sought to be refunded represented community property (Pet. App. 2–B to 4–B). Several months later, the district court granted petitioner Diehl's motion to be substituted for the decedent, as the appointed executrix of his estate,[1] pursuant to Rule 25(a)(1) of the Federal Rules of Civil Procedure. However, upon the government's motion to vacate the substitution on the ground that the order of the probate court appointing her executrix had been based upon material misrepresentations of fact (Pet. App. 4–B to 5–B),[2] the district court vacated the substitution order.

Thereafter, the district court granted a motion to substitute petitioner Ritter as plaintiff in the refund suit on the ground that he was temporary adminis-

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[1] Petitioner Diehl was appointed executrix by a Texas probate court on the basis of her allegations that the decedent had died domiciled in Texas, never having been divorced, that she was his widow, and that the decedent's last will named her as executrix (Pet. App. 5–B to 7–B).

[2] The government's motion presented the following newly discovered facts: The decedent and petitioner Diehl had obtained a Mexican divorce on October 28, 1959; the decedent had remarried, executed a new will naming his second wife as executrix, had left Texas seven years prior to his death, and had established a permanent home in California (Pet. App. 5–B to 7–B).

trator of the decedent's estate (Pet. App. 12–B to 13–B).[3] But this substitution was also vacated, on the court's own motion, on the ground that since the decedent had died domiciled in California leaving no assets in Texas, the Texas probate court had no jurisdiction to appoint an administrator to pursue the refund litigation. The district court thereupon dismissed the refund action[4] and the court of appeals affirmed (Pet. App. 1–B to 21–B).

ARGUMENT

The decision below is correct, and there is no conflict of decisions or other reason for further review.

1. The district court properly refused to substitute petitioner Diehl for the decedent in the refund suit pending at his death. The "proper party" to be substituted under Rule 25(a)(1) of the Federal Rules of Civil Procedure is the legal representative of the decedent, *Mallonee* v. *Fahey*, 200 F. 2d 918 (C.A. 9). The decedent's marriage to petitioner Diehl, however, was terminated by divorce in 1959.[5] Petitioner Diehl's

[3] Ritter's appointment as temporary administrator by the probate court was based on his allegation that the estate consisted solely of Diehl's claim for refund and that the administration was sought under Section 6(e) of the Texas Probate Code for the sole purpose of receiving funds or money due to the decedent from the United States (Pet. App. 16–B).

[4] Petitioner Diehl was allowed 30 days to reinstate the suit in her own right if in fact she had filed a claim for refund (Pet. App. 19–B to 20–B).

[5] Although the divorce was procured in Mexico, both parties were present and represented by counsel. Petitioner Diehl was thus estopped from challenging the validity of that divorce for the sole purpose of claiming "widow" status and assuming a fiduciary role in her former husband's estate. *Perrin* v. *Perrin*, 408 F. 2d 107 (C.A. 3); *Dunn* v. *Tiernan*, 284 S.W. 2d 754 (Tex. Civ. App.).

appointment as executrix by the Texas probate court was based on material misrepresentations and was properly disregarded by the district court.

2. Moreover, the decedent died a domicilary of California, where he had resided with his second wife for five years prior to his death, and left no assets in Texas which could be the basis for founding an administration in that state. The estate's only asset was his claim for refund—a debt due from the United States, whose situs was in California, the creditor's domicile. *Wyman* v. *Halstead,* 109 U.S. 654 (1884). The Texas probate court thus had no jurisdiction over the decedent's estate. See *Cooper* v. *Gulf C. & S.F. Ry. Co.,* 93 S.W. 201 (Tex. Civ. App.). Its orders appointing petitioner Diehl as executrix and petitioner Ritter as temporary administrator were void and not entitled to full faith and credit in the district court. *Burbank* v. *Ernst,* 232 U.S. 162; *Tilt* v. *Kelsey,* 207 U.S. 43.[6]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General,
JOHNNIE M. WALTERS,
Assistant Attorney General,
ANN E. BELANGER,
Attorney.

JULY 1971.

[6] Of course, the decision below does not affect any rights the decedent's second wife might have to pursue the refund litigation.

U.S. GOVERNMENT PRINTING OFFICE: 1971